Supreme Court, U.S.
FILED

001794 MAY 31 2001

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No. _____

In The

Supreme Court of the United States

The Louisiana Philharmonic Orchestra,

Petitioner,

v.

U.S. Immigration and Naturalization Service,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

PETER L. KOERBER
Counsel of Record
LEMLE & KELLEHER, L.L.P.
601 Poydras Street
New Orleans, Louisiana 70130
504-584-9130

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Questions Presented for Review

The Immigration and Nationality Act entitles an employer to employ a nonimmigrant alien for a limited period if, in the words of the applicable regulation,

> the nature of the specific duties [which the employer wishes to hire the alien to perform] are so specialized and complex that knowledge required to perform the duties is *usually* associated with the attainment of a baccalaureate or higher degree . . . (Emphasis added.)

and if the employer satisfies certain other conditions, which are not at issue. The Orchestra submitted evidence from orchestra directors around the country that typically a very high percentage (often 90-95%) of the musicians in symphony orchestras possess bachelor's or higher degrees in Music.

The INS Administrative Appeals Unit denied the Orchestra's petition because

> The Department of Labor's *Occupational Outlook Handbook*, . . . finds no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician. (Emphasis in original).

The District Court dismissed the Orchestra's complaint, but on a different ground:

Questions Presented for Review – Continued

The INS was within its discretion in defining a speciality occupation in such a way that a position qualifies only if it requires knowledge that is *always* or *nearly always* associated with a bachelor's degree or higher *rather than* knowledge that is *usually* associated with such a degree. (Emphasis added.)

The Court of Appeals affirmed, "based on the federal district court's opinion."

1. Whether the INS Administrative Appeals Unit and the lower courts lawfully restricted the H-1B visa program and lawfully denied the Orchestra the opportunity to hire a much-needed violinist where

(a) the lower court substituted "always or nearly always" for "usually" in the applicable regulation?

(b) the INS Administrative Appeals Unit imposed a requirement for approval of the petition – that the Occupational Outlook Handbook state that the job requires a bachelor's degree – that is not found in the statute, the INS regulation or the INS and judicial precedents?

(c) the INS and the lower courts determined that playing violin in a professional symphony orchestra does not entail "knowledge . . . *usually* associated with the attainment of a baccalaureate or higher degree" even though 90-95% of such violinists have a bachelor's degree in Music?

Questions Presented for Review – Continued

2. Whether the INS AAU afforded the Orchestra due process of law and complied with its regulation when it denied the Orchestra's petition for a failure to sustain the burden of proof, but did not mention in its opinion any of the evidence or precedents submitted by the Orchestra?

Parties to the Proceeding

The parties to the proceeding are The Louisiana Philharmonic Orchestra and the U.S. Immigration and Naturalization Service. The Orchestra does not have a parent or a subsidiary.

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Louisiana Philharmonic Orchestra vs Immigration and Naturalization Service, (5th Cir. 2001), unpublished; app. 1 and 42.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 2001. The Court of Appeals denied the Orchestra's petition for rehearing and its petition for rehearing en banc on March 2, 2001.

28 USC § 1254 (1) confers on this Court jurisdiction to review on a writ of certiorari the judgment or order in question.

STATUTES AND REGULATIONS

INA § 214 (8 USC § 1184). Admission of nonimmigrants.

. . .

(c) Petition of importing employer; involvement of Departments of Labor and Agriculture

> (1) The question of importing any alien as a nonimmigrant worker under section 1101(a)(15)(H) . . . of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant. . . .

INA § 101 (8 USC § 1101). Definitions.

(a) As used in this chapter –

. . .

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens –

. . .

> (H) an alien (i) . . . (b) . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in

section 1184(i)(1) of this title . . . , who meets the requirements for the occupation specified in section 1184 (i)(2) of this title . . .

INA § 214 (8 USC § 1184). Admission of nonimmigrants.

. . .

(i) "Specialty occupation" defined.

(1) For purposes of section 1101(a)(15)(H)(i)(b) of this title and paragraph (2), the term "specialty occupation" means an occupation that requires –

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

(2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are –

. . .

(B) completion of the degree described in paragraph (1)(B) for the occupation, . . .

8 CFR § 214.2 Special requirements for admission, extension, and maintenance of status.

(h) Temporary employees.

. . . .

(4) *Petition for alien to perform services in a specialty occupation . . . (H-1B).*

. . . .

(iii) *Criteria for H-1B petitions involving a specialty occupation* –

(A) *Standard for specialty occupation position.* To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

STATEMENT OF THE CASE

The Immigration and Nationality Act entitles an employer to employ a nonimmigrant alien for a limited period if, in the words of the applicable regulation,

> the nature of the specific duties [which the employer wishes to hire the alien to perform] are so specialized and complex that knowledge required to perform the duties is *usually* associated with the attainment of a baccalaureate or higher degree . . . (Emphasis added.)

and if the employer satisfies certain other conditions, which are not at issue. 8 USC §§ 1184(c)(1) and (5), 1101(a)(15)(H)(i)(b), 1184(i), 1184 (g)(1)(A) and 1102 (n)(1); 8 CFR § 214.2 (h)(4)(iii)(A)(4).

The Orchestra petitions to employ Ms. Zhao as a violinist under the H-1B visa program established by the statutes and regulation cited above. Ms. Zhao earned a baccalaureate degree in Music from the Shanghai Conservatory of Music.

"The Orchestra submitted evidence, including statements from orchestra directors around the country, that typically a very high percentage (often 90-95%) of their members possessed bachelor's degrees or higher, although this was not an absolute requisite to employment." App. 34 at 35; see app. 6 at 10-12 for excerpts from these statements. The musicians' degrees are in Music. The Orchestra also submitted citations to INS precedents and to prior petitions by the Orchestra which the INS had approved. The INS has approved similar petitions for other full-time, full-size orchestras. The Orchestra submitted evidence regarding baccalaureate-level education

in Music in the United States. Institutions in Europe and Asia also offer baccalaureate degrees in Music.

The INS Northern Service Center denied the petition. App. 6.

The INS Administrative Appeals Unit ("AAU") dismissed the appeal on a ground different from the ground on which the Service Center relied. The AAU did not mention the evidence submitted by the Orchestra or the precedents on which the Orchestra relies. The AAU stated:

> The Department of Labor's *Occupational Outlook Handbook*, . . . finds no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician. (Emphasis in original).

The AAU concluded, "The petitioner has not sustained that burden [of proof]." App. 14 at 19.

In its first decision, the District Court granted summary judgment for the Orchestra. The Court held,

> To deny a visa for what is apparently a nearly identical position would fall within the discretion committed to the agency, but not without some sort of explanation articulating why the three previous approvals were erroneous. . . . The AAU abused its discretion by denying the petition without explaining its inconsistent decisions.

44 F.Supp. 2d at 803-04; app. 20 at 27.

The AAU responded, "For the reasons discussed in the prior decision by the AAU in this matter, it is concluded that these [prior] petitions were approved in error." App. 29 at 32.

In its second decision, the District Court accepted the AAU's explanation. The Court further held:

> The record suggests that substantial evidence supports the INS decision in the case. The AAU considered the evidence presented by the LPO, including the letters from various orchestra directors from around the country, in reaching its decision to deny the petition. While the evidence may support a conclusion different from the one by the AAU, it does not compel it. . . . The INS was within its discretion in defining a specialty occupation in such a way that a position qualifies only if it requires knowledge that is *always or nearly always* associated with a bachelor's degree or higher *rather than* knowledge that is *usually* associated with a degree. [Emphasis added.]

App. 34 at 40; 2000 WL 282785 and 2000 U.S. Dist. LEXIS 3331. The District Court was mistaken; the AAU did not mention the evidence presented by the Orchestra. The District Court did not mention what evidence supported the decision of the AAU. Nor did it mention the Occupational Outlook Handbook, on which the AAU had relied.

In its brief to the Court of Appeals, the INS disavowed the rationale of the District Court, stating, " . . . it bears mentioning that AAO never expressly interpreted the regulation as 'always or almost always' requiring a degree." INS brief p. 23, see also INS brief pages 23 n 2, 24 and 25.

The Court of Appeals affirmed, "based on the federal district court's opinion". App. 1. The Court of Appeals did not mention the District Court's construction of the regulation. Rather, it said, " . . . the trial court stated that substantial evidence, including letters from various orchestra directors, supported the INS's denial." App. 1 at 4 fn. 4. It appears to the Orchestra that the Court of Appeals misapprehended the District Court's appreciation of the "letters from various orchestra directors". App. 34 at 35 and 40. The Court of Appeals denied rehearing and rehearing en banc. App. 42.

The H-1B visa program

The Immigration Act of 1990 revised the pre-existing program for admitting nonimmigrant workers, defined the H-1B specialty occupation as a separate category and established a numerical limit on the number of H-1B visas that can be issued. P.L. 101-649, section 205.

Speaking generally, prior to the Immigration Act of 1990, an employer could seek an H-1 nonimmigrant visa for a position if "attainment of a baccalaureate degree is *usually* the minimum requirement for entry into the occupation." (Emphasis added.) *Matter of Desai*, 17 I & N Dec. 569, 1980 WL 121949 (R.C. 1980); INS 1040-89 (January 5, 1990), 55 FR 2606, 2608-10 (January 26, 1990). Again speaking generally, the 1990 amendments enacted specific statutory language to overrule certain implementations of this program, but did not affect the rules applicable to the Orchestra's petition. The post-1990-Act regulation, 8 CFR § 214.2 (h)(4)(iii)(A) (1991), carries forward the language of the pre-1990-Act regulation, 8 CFR 214.2 (h)(3)(iii)(A)

(1990), except that the current regulation uses the phrase "specialty occupation" in place of the term "profession", reflecting the change in statutory terminology. See INS 1417-91 (April 1, 1991), 56 FR 31553, 31554 (July 11, 1991) ("The definition and standards for an alien in a specialty occupation mirror the Service's current requirements for aliens who are members of the professions."); and (December 2, 1991), 56 FR 61111.

The statute provides that H-1B visas are to be granted "in the order in which petitions are filed for such visas". 8 USC § 1184 (g)(3).

O and P visas; Ms. Zhao

The Immigration and Nationality Act allows employers to hire alien musicians in several other categories, including the O and P visas. 8 USC §§ 1101 (a)(15)(O)(i) and (P)(i) and 1184 (c)(4)(B). The O category requires a demonstration of "sustained national or international acclaim"; the P category requires that the alien have "been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time." Ordinarily, the Orchestra, which can offer only meager compensation, cannot hope to employ an alien of such prominence.

When the Orchestra learned of the delays at the INS Administrative Appeals Unit, the Orchestra applied for an O visa for Ms. Zhao, which was issued. Ms. Zhao subsequently gave birth to a child and left the Orchestra.

The issuance of the 0-1 visa does not moot this action, because this action presents a recurring issue, which

would otherwise evade review. *Richardson* vs *Ramirez*, 418 US 24, 34-40, 94 SCt 2655, 2661-64 (1974); *Honig* vs *Doe*, 484 US 305, 317-23, 108 SCt 592, 601-04 (1988). The Orchestra filed its petition on November 27, 1995 and submitted additional evidence on March 29, 1996; the Service Center denied the petition on May 6, 1996; the Administrative Appeals Unit dismissed the Orchestra's appeal on August 28, 1998; the District Court dismissed the Orchestra's complaint on March 17, 2000; the Court of Appeals denied the Orchestra's petitions for rehearing on March 2, 2001. The Orchestra was able to offer Ms. Zhao a salary of $400 per week for a 34-week season. (R. 410). As a practical matter, a violinist will not wait five years to see whether he or she will be allowed to accept a $13,600 per year job. It would not be good law to require the Orchestra, as a condition to obtaining judicial review of the INS's position, to make an offer of employment which the Orchestra knows as a practical matter that it will not be able to honor within a reasonable period of time. The INS and judicial rulings in this case bar the Orchestra from hiring under the H-1B visa program. This action is the Orchestra's only opportunity for review of those rulings.

The Administrative Appeals Unit

The Administrative Appeals Unit hears appeals from denials of H-1B visa petitions and from certain other matters. 8 CFR §§ 103.1 (f)(3)(iii)(J) and 103.3 (a)(1)(iv).

The procedural rules for the AAU are set forth at 8 CFR § 103.3 (a)(2). The administrative record in the present case contains only the petition, the written evidence

and briefs submitted by the Orchestra and the Decisions of the Service Center and the AAU. The INS did not offer evidence or file a brief. The AAU did not permit the Orchestra to present oral argument.

The AAU has been called the AAO or the Office of Administrative Appeals since 1994, 59 FR 60,065, 60,066, but the regulations still refer to this part of the INS as the "AAU". 8 CFR § 103.3.

The AAU has apparently not published any of its decisions involving H-1B petitions. There are published INS decisions, on which the Orchestra relies, regarding what is now the H-1B visa program, which pre-date the Immigration Act of 1990.

Jurisdiction of the U.S. District Court

The U.S. District Court had jurisdiction over the Orchestra's complaint for judicial review under 28 USC § 1331.

ARGUMENT

1. The INS and the lower courts have unlawfully restricted the H-1B visa program and have unlawfully denied the Orchestra the opportunity to hire a much-needed violinist.

(a) The lower court erred in holding that

> **The INS was within its discretion in defining a specialty occupation in such a way that a position qualifies only if it requires knowledge that is *always* or *nearly always* associated with a bachelor's degree or higher *rather than* knowledge that is *usually* associated with such a degree. [App. 40; emphasis added.]**

where the applicable INS regulation only requires

> **that knowledge required to perform the duties is *usually* associated with the attainment of a baccalaureate or higher degree. [Emphasis added.]**

The words "rather than" in the District Court's opinion signify that "always or nearly always associated" is different from "usually associated", and clearly imply that, in the Court's judgment, the Orchestra had met the "usually associated" standard.

Stanley Mailman and Stephen Yale-Loehr, authors of the leading treatise on immigration law and procedure, commented on the District Court's interpretation of the regulation:

> How can the regulatory formula of "usually associated" be rationally read to mean "always or nearly always associated"?

"The Evolving Boundaries of H-1B Classification", 233 N.Y.L.J., no. 122, page 3 (June 26, 2000).

The District Court is not authorized to re-write a regulation. *INS* vs *Hector*, 479 US 85, 107 SCt 379 (1986) (reversing judicial enlargement of the statutory phrase "spouse, parent or child" to include a relationship with nieces that closely resembled parent-child relationship.); *INS* vs *Phinpathya*, 464 US 183, 104 SCt 584 (1984) (reversing judicial exception to statutory requirement that an applicant have been physically present in the United States for a continuous period of not less than seven years.).

In it brief to the Court of Appeals, the INS wrote:

> . . . it bears mentioning that the AAO never expressly interpreted the regulation as "always or almost always" requiring a degree.[2]

---

[2] To be clear, the AAO never employed the phrase "always or almost always." That phrase was used by the district court. The district court's assessment was not altogether inaccurate as at least a short-handed way of describing the AAO's interpretation.

[page 23; see also pages 24 and 25].

(b) The INS Administrative Appeals Unit unlawfully imposed a requirement for petition approval – that the Occupational Outlook Handbook state that the job requires a bachelor's degree – which is not imposed by the statute or the regulation and which is inconsistent with INS and judicial precedent.

The AAU's Decision rests on its observation:

> The Department of Labor's *Occupational Outlook Handbook*, . . . finds no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician. [App. 19; emphasis in original.]

The AAU mentions that musicians may receive training outside baccalaureate programs, but does not say how often this occurs or whether persons who lack a degree are likely to be hired by full-time, full-size symphony orchestras. It does not make a connection between its view of how musicians learn their craft and the "usually associated" test of the regulation. The AAU's decision rests on the silence of the Occupational Outlook Handbook. Its holding limits the H-1B visa program to those jobs for which the Handbook states that a degree is required.

The rule adopted by the AAU imposes a condition not sanctioned by the statute or regulation and materially narrows the scope of the H-1B visa program. The holding of the AAU is not an interpretation of the regulation, but a re-writing of it. Similar action was overturned in *Ruangswang* vs *Immigration and Naturalization Service*, 591 F.2d 39, 43-44 hn 2 (9th Cir. 1978) ("The objective criteria

of the 1973 regulation were clearly met by Mrs. Ruangswang. There simply is no room for the agency to interpret the regulation so as to add another requirement."); *Patel* vs *Immigration and Naturalization Service*, 638 F.2d 1199 (9th Cir. 1980).

The AAU's holding is inconsistent with INS precedents which recognize jobs as "professional" (now "specialty occupations") based on evidence other than a statement in the Occupational Outlook Handbook. *Matter of Desai*, 17 I & N Dec. 569, 1980 WL 121949 (R.C. 1980) (letters from professional organization, three employers and director of university program); *Matter of Villanueva*, 13 I & N Dec. 733, 1971 WL 24411 (Dep.Assoc.Comm. 1971) (letter from professional organization; educational standards of professional association).

An agency interpretation of its regulation which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held view. *INS* vs *Cardoza-Fonseca*, 480 US 421, 446 fn 30, 107 SCt 1207, 1221 fn 30, hn 5 (1987).

The law recognizes that the Occupational Outlook Handbook groups jobs which are "specialty occupations" with jobs which are not, without distinguishing between the two types of jobs. *Matter of Hung*, 12 I & N Dec. 501, 1967 WL 14075 (R.C. 1967); *Matter of Caron International, Inc.*, Interim Dec. 3085, 1988 WL 235463 (Comm. 1988); *Defensor* vs *Meissner*, 201 F.3d 384, 387 fn 2 (5th Cir. 2000); *All Aboard Worldwide Couriers* vs *Attorney General*, 8 F.Supp.2d 379, 381 hn 3 (S.D.N.Y. 1998); *Mindseye* vs *Ilchert*, no. C84-6199, 1985 U.S. Dist. LEXIS 17986 (N.D. Cal. July 11, 1985). The Handbook article on musicians

covers the employed and the self-employed, persons who work with music full-time and part-time, and composers, conductors, teachers, singers and players of instruments. The law permits employers to hire a limited number of educated aliens. It makes no sense, given what Congress was trying to accomplish, to exclude a person who is highly educated for a particular occupation simply because other persons who are not highly-educated can do somewhat similar work, but not the work that the educated person can do. The AAU departed from settled law when it used the Handbook to mark the boundaries of the H-1B visa program where the Handbook does not address the job in question, but only the great variety of remunerative activities involving music.

(c) The Orchestra is entitled to approval of its petition, where the condition for approval is that the "knowledge require[d] to perform the duties is usually associated with the attainment of a baccalaureate or higher degree", because 90-95% of the persons who play violin in full-time, full-size symphony orchestras have a bachelor's degree in Music.

The District Court summarized the record: "The LPO submitted evidence, including statements from orchestra directors around the country, that typically a very high percentage (often 90-95%) of their members possessed bachelor degrees or higher, although this was not an absolute prerequisite to employment." App. 34 at 35. The witnesses also said: "The reality is, that only the very best of these musicians are successful in winning full-time orchestra positions and it is those musicians who have

successfully completed (and excelled at) at least a four-year professional course who win these positions." (R. 493). "As a practical matter, to get a job in a professional symphony orchestra a musician must acquire the musical knowledge that is imparted by a course of study leading to a baccalaureate degree in music." (R. 557). See also app. 11-12.

The words "rather than" in the District Court's opinion signify that "always or nearly always associated" is different from "usually associated", and clearly imply that, in the District Court's judgment, the Orchestra had met the "usually associated" standard.

Stanley Mailman and Stephen Yale-Loehr, authors of the leading treatise on immigration law and procedure, commented:

> And how can a "high percentage (often 90 to 95 percent)" fall short of "usually" or even "nearly always"?

"The Evolving Boundaries of H-1B Classification", 233 N.Y.L.J., no. 122, page 3 (June 26, 2000).

2. The INS Administrative Appeals Unit did not afford the Orchestra due process and did not abide by the applicable regulation where it held that the Orchestra had not sustained its burden of proof, but did not mention in its opinion the evidence and precedents on which the Orchestra relies.

The AAU concluded that the Orchestra had not sustained its burden of proof, but the AAU did not mention

any of the evidence or precedents which the Orchestra offered in support of its petition.

The evidence submitted by the Orchestra – that 90-95% of the persons who hold the job have earned a specialized degree, that executives in the industry are of the opinion that with rare exceptions only persons with the specialized degree are being hired, and that the INS had previously approved similar petitions for the Orchestra and other orchestras – constitutes a *prima facie* showing that the Orchestra is entitled to approval of its petition.

The applicable regulation requires the AAU to render its decision in writing. 8 CFR § 103.3 (a)(2)(x).

The Administrative Procedure Act requires a court to consider the "whole record" in reviewing agency action. 5 USC § 706, final sentence. *Universal Camera Corp.* vs *NLRB*, 340 US 474, 487-88, 71 SCt 456, 464-65 hn 2 (1951). A fortiori, the agency is obliged to consider the whole record in reaching its decision.

It is settled law that

> . . . we generally also review the BIA's decision " 'procedurally' to ensure that the complaining alien has received full and fair consideration of all circumstances that give rise to his or her claims." *Zamora-Garcia v. INS*, 737 F.2d 488, 490 (5th Cir. 1984). While we do not require that the BIA address evidentiary minutiae or write any lengthy exegesis, *Ramos v. INS*, 695 F.2d 181, 189 (5th Cir. 1983), its decision must reflect meaningful consideration of the relevant substantial evidence supporting the alien's claims. *Id.* at 188. *See also Diaz-Resendez v. INS*,

960 F.2d 493, 495, 497-98 (5th Cir. 1992); *Ganjour v. INS*, 796 F.2d 832, 839 (5th Cir. 1986).

Abdel-Masieh vs *U.S. I.N.S.*, 73 F.3d 579, 585 hn 8 (5th Cir. 1996) (vacating and remanding where "the BIA has failed to address much of Abdel's key evidence.") For other precedents that vacate and remand an INS decision where the INS failed to address evidence and contentions, see *Blanco* vs *INS*, 68 F.3d 642, 646-47 (2d Cir. 1995); *Shahandeh-Pey* vs *INS*, 831 F.2d 1384, 1388-89 hn 3 (7th Cir. 1987); and *Mattis* vs *INS*, 774 F.2d 965, 967-68 hnn 3 and 4 (9th Cir. 1985).

If an agency does write an opinion, due process requires that the agency give a fair statement of the evidence, precedents and contentions. The duty to give a fair statement militates against whatever pressure the decisionmaker may feel to decide a petition on some basis other than the facts and the law. When an agency or a court fails to give a fair statement of the case, the losing party reasonably regards such evasion as an acknowledgment of the merit of its position and naturally feels that it has been denied justice. Moreover, a conclusory statement may preclude meaningful appellate review. The benefits of better decision-making, more ready acceptance of the result by the losing party and more assured judicial review outweigh the cost of requiring the AAU to add a paragraph to its opinion.

In this case it is quite possible that the AAU would have reached a different conclusion if it had given a full and fair statement of the evidence and precedents submitted by the Orchestra. *Shahandeh-Pey* vs *INS*, 831 F.2d 1384, 1389 hnn 4 and 5 (7th Cir. 1987).

This case differs from *INS* vs *Aguirre-Aguirre*, 526 US 415, ___, 119 SCt 1439, 1448-49 hn 8 (1999), where the Court held that the Court of Appeals had erred in requiring the Board of Immigration Appeals to give "more express consideration" to certain issues. The Court noted that the BIA's analysis was "quite brief" and "rather cursory". But in *Aguirre-Aguirre*, the Immigration Judge had not addressed the issue in question, the alien had not submitted a brief to the BIA and the BIA had placed its decision on an independently sufficient ground. In this case, the Service Center did address the issue, the Orchestra submitted a brief and additional evidence to the AAU and the AAU denied the petition for failure of proof, the precise issue for which it failed to discuss the evidence and the precedents.

REASONS TO GRANT THE WRIT

1. The H-1B visa program is important. The decisions of the AAU and the lower courts deprive U.S. employers of needed workers, contrary to the intent of Congress.

Congress has legislated repeatedly to expand the H-1B program to meet the needs of our economy. P.L. 105-277 (1998), 106-311 (2000) and 106-313 (2000).

The rules announced by the AAU and the lower courts severely limit the scope of the H-1B visa program.

There are simply not enough American violinists to meet the Orchestra's needs. In May 1992 the Orchestra held auditions for 7 violin positions, but was able to fill

only 3 positions. In May 1993 the Orchestra held auditions for 8 violin positions, but was able to fill only 3 positions. In May 1994 the Orchestra held auditions for 12 violin positions, but was able to fill only 6 positions. In May 1995 the Orchestra held auditions for 6 violin positions, but was able to fill only 3 positions. . . . In May 1996 the Orchestra held an audition for concertmaster (the leader of the first violin section and traditionally the highest-paid musician), but did not fill the position. Disney sponsored a concert in New Orleans during the summer of 1996; violinists flew in from Los Angeles because there were not enough violinists in New Orleans. At each of these auditions, the number of persons seeking the position was several times the number of unfilled positions. There were many applicants who could not meet the minimum standards of the Orchestra, which was desperate to hire violinists. No qualified American violinist has ever been denied a job by the Orchestra. (R. 434, 552.)

2. The decision of the Court of Appeals conflicts with decisions of the Second, Fifth, Seventh and Ninth Circuits.

The Court of Appeals' silent rejection of the Orchestra's due process claim is inconsistent with the precedents mentioned on page 19 above.

CONCLUSION

For the foregoing reasons, the Orchestra prays that the Court hear its case.

Respectfully submitted,

PETER L. KOERBER
Counsel of Record
LEMLE & KELLEHER, L.L.P.
601 Poydras Street
New Orleans, Louisiana 70130
504-584-9130

Attorneys for Petitioner
The Louisiana Philharmonic Orchestra

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-30424
SUMMARY CALENDAR

LOUISIANA PHILHARMONIC ORCHESTRA,
Plaintiff-Appellant,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(Filed Jan. 24, 2001)

Before **REYNALDO G. GARZA, BARKSDALE, and STEWART**, Circuit Judges.

PER CURIAM:[1]

The appellant, the Louisiana Philharmonic Orchestra ("Orchestra") appeals the federal district court's dismissal of its complaint seeking judicial review of the United States Immigration and Naturalization Service's ("INS") denial of the Orchestra's petition seeking non-

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[1] Pursuant to 5th Cir. R. 47.5, this Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

immigrant-worker status for Lingyiang Zhao ("Zhao"). For the reasons stated below, we affirm the dismissal.

The Orchestra is located in New Orleans, Louisiana. It is the only full-time, full-size professional symphony orchestra between Atlanta, Georgia and Houston, Texas. During the 1995-96 season, it gave 137 performances and employed seventy musicians.

In the Fall of 1995, the Orchestra sought to hire Zhao as a violinist. Zhao is a citizen of the People's Republic of China. Accordingly, the Orchestra filed a petition for non-immigrant worker status, on behalf of Zhao, with the INS's Nebraska Service Center ("NSC"). In the petition, the Orchestra requested that the INS grant Zhao a visa and classify her as an H-1B alien. An H-1B alien may temporarily reside in the United States to "perform services . . . in a specialty occupation." 8 U.S.C. § 1101(a)(15)(H) (1995). A "specialty occupation . . . is an occupation that requires [the] theoretical and practical application of a body of highly specialized knowledge and [the] attainment of a bachelor's degree or [a] higher [degree] in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1) (1995).

Since the Orchestra conceded an advanced degree[2] was not required to be employed as an orchestra violinist in the United States, the NSC, pursuant to 8 C.F.R. §214.2(h)(4)(iii)(A) (1995),[3] requested the Orchestra to

---

[2] An advanced degree is a baccalaureate or higher degree.

[3] 8 C.F.R. §214.2(h)(4)(iii)(A) is an INS regulation that interprets 8 U.S.C. § 1184(i).

present evidence that showed that an orchestra violinist's specific duties are so specialized and complex that the knowledge required to perform such duties is usually associated with the attainment of an advanced degree. The Orchestra presented evidence. The NSC, however, concluded that an orchestra violinist's specific duties are not so specialized and complex that the knowledge required to perform such duties is usually associated with the attainment of an advanced degree because orchestra positions are often filled through blind auditions without regard to one's educational credentials. The NSC denied the Orchestra's petition.

The Orchestra appealed the NSC's denial of its petition to the INS's Administrative Appeals Unit ("AAU"). The AAU affirmed the denial. The Orchestra then filed suit in federal district court seeking judicial review of the INS's denial of its petition. The Orchestra filed a motion for summary judgment. It argued that the INS's denial of its petition was arbitrary and capricious and constituted an abuse of discretion for two reasons: the INS misapplied 8 C.F.R. §214.2(h)(4)(iii)(A) because it had in effect required that all persons in a prospective specialty occupation have an advanced degree; and the INS had earlier granted three aliens, that the Orchestra had previously sought to hire, H-1B status ("Three Aliens").

The federal district court granted the Orchestra's motion for summary judgment. *See Louisiana Philharmonic Orchestra v. I.N.S.*, 44 F.Supp.2d 800 (E.D. La. 1999). The trial court found that the INS had abused it [sic] discretion when it denied the Orchestra's petition without explaining the difference between Zhao's case and the Three Aliens' cases. The trial court reversed the AAU's

ruling and remanded the case to the AAU with instructions to either: grant the Orchestra's petition for Zhao; or articulate a rational basis for its inconsistent treatment of Zhao.

On May 3, 1999, the AAU issued a ruling denying the Orchestra's petition that explained its rational [sic] for Zhao's inconsistent treatment. AAU stated that it was not bound by the NSC's decisions, that the NSC erroneously granted the Three Aliens H-1B status, and that if their cases had been appealed to the AAU, the AAU would have denied their petitions. In response, the Orchestra amended its complaint for judicial review. The Orchestra argued that the AAU's second ruling was arbitrary and capricious, constituted an abuse of discretion, and was not supported by the evidence. The INS filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss the Orchestra's complaint. The federal district court granted the INS's motion to dismiss. *See Louisiana Philharmonic Orchestra v. I.N.S.*, 2000 WL 282785 (E.D. La. 2000). The trial court found that the AAU had articulated a rational basis for Zhao's inconsistent treatment and that substantial evidence supported the AAU's decision.[4] The Orchestra appealed.

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[4] The trial court likened the relationship between the NSC and the AAU to the relationship between a district court and a court of appeals. It stated "[j]ust as district courts do not bind the courts of appeals, service center decisions do not control the AAU." The trial court reasoned that Zhao's case was not controlled by the NSC's earlier decisions regarding the Three Aliens and accepted the INS's conclusion that the Three Alien's petitions were mistakenly approved. Addressing the substantial evidence argument, the trial court stated that substantial evidence, including letters from various orchestra directors, supported the INS's denial. The trial court further noted that

Having reviewed the parties' brief, the record, and the applicable authority, we AFFIRM the dismissal of the Orchestra's complaint seeking judicial review of the INS's denial of the Orchestra's petition seeking non-immigrant worker status for Zhao based on the federal district court's opinion in *Louisiana Philharmonic*, 2000 WL at 282785.

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just because evidence may support a different a conclusion, it does not compel it.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
P.O. Box 82521
Lincoln, Nebraska 68501-2521

Refer To File No.
LIN 96 045 51361
(Filed May 06, 1996)

THE LOUISIANA PHILHARMONIC ORCHESTRA
C/O PETER L KOERBER
601 POYDRAS STREET
NEW ORLEANS LA 70130

DECISION

Upon consideration, it is ordered that your Petition for Nonimmigrant Worker be denied for the following reasons:

"SEE ATTACHMENT"

You may, if you wish, appeal this decision. You must submit such an appeal to THIS OFFICE with a filing fee of $110.00. If you do not file an appeal within the time allowed, this decision is final. Appeal in your case may be made to:

[ ] The Board of Immigration Appeals (Board) in Falls Church, Virginia. It must reach this office within 15 calendar days from the date this notice is served (18 days if this notice is mailed).

[X] The Administrative Appeals Unit (AAU) in Washington, D.C. It must reach this office within 30 calendar days from the date this notice is served (33 days if this notice is mailed).

Do NOT send your appeal directly to the Board or to the AAU. Please direct any questions you may have to the Immigration and Naturalization Service office nearest your residence.

/s/ Natalie Vedder
Natalie Vedder
Director

Enclosure (s)

I-290B
MAR/mal

In this petition, filed on November 27, 1995, the petitioner is requesting that the beneficiary be classified as an H-1B alien to perform services in a specialty occupation. Section 101(a) (15) (H) of the Immigration and Nationality Act, as amended, defines an H-1B nonimmigrant as:

> . . . an alien who is coming temporarily to United States to perform services . . . in a specialty occupation . . .

Furthermore, Section 214(i) (1) of the Immigration and Nationality Act states:

> . . . the term "specialty occupation" means an occupation that requires –
>
> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's degree of higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Finally, Section 214(i) (2) of the Act specifies the requirements with respect to a specialty occupation as being:

(A) full state licensure to practice in the occupation, if such is required to practice in the occupation,

(B) completion of the degree described in paragraph (1) (B) for the occupation, or

(C) (i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The record indicates that the petitioner desires the services of the beneficiary as a section violinist.

Title 8, Code of Federal Regulations, Part 214.2(h) (4) (ii) defines "specialty occupation" as:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent as a minimum for entry into the occupation in the United States.

Title 8, Code of Federal Regulations, Part 214.2(h) (4) (iii) (A) states that to qualify as a specialty occupation, the position must meet one of the following criteria:

> 1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> 2) The degree requirement is common to the industry in parallel positions among similar

organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

3) The employer normally requires a degree or its equivalent for the position; or

4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The record reflects that the petitioner intends to employ the beneficiary in a full-time, professional symphony orchestra which has 70 members. The petitioner submitted the instant petition, noting that it was requesting H-1B classification, and in the alternative, 0-1, alien of extraordinary ability in the sciences, arts, education, or business. Upon resubmission, the petitioner requests full consideration under the H-1B classification.

The beneficiary was selected by the petitioner following a formal audition. The duties of the proffered position were not specified. However, a general description of the position of musician is described in a consultation dated September 25, 1995, which was solicited from the Musicians Mutual Protective Union, a labor organization in the musical field:

> You ask about "the nature of the work to be done and the alien's qualifications". In a symphony orchestra, a section player must be able to read and perform the written score for that section in a professional manner, be adaptable to a conductor's interpretation of a selection, be

> punctual in attendance and conscientious in private practice on upcoming difficult passages in pieces to be performed and be of good personal behavior. In short, the demands all tend to require true skill an [sic] a professional attitude.

The petitioner has submitted letter of support from experts in the field attesting to the attainment of a baccalaureate degree or higher by orchestra musicians. A letter from the petitioning organization's Personnel Manager, Jack Gardner, notes:

> It is fair to say that "the nature of the specific duties [of a musician in a symphony orchestra] are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.
>
> Virtually all members of the Orchestra have a baccalaureate degree and a substantial number of them have an advanced degree. So far as I am aware, members of other full-time, professional symphony orchestras around the country have similar qualifications.
>
> Musicians are hired for symphony orchestras by blind audition, not on the basis of their education or academic performance.

Another letter from Jeff Woodruff, Director of Operations/Artistic Administrator of The Florida Orchestra, states:

> . . . In response to your letter dated April 12, 1995, the chairman of our orchestra Committee has provided me with the following information: 80% of our musicians have bachelor

> degrees, and 52% of our musicians have master's degrees or higher.
>
> In my opinion, while playing in the Florida Orchestra does not require a degree, earning one is certainly helpful in providing a musician the skills and knowledge necessary to succeed in a professional orchestra.

Since the possession of at least a bachelor's degree, or specialized knowledge that is usually associated with the attainment of a baccalaureate or higher degree is not an absolute requirement within the industry, the petitioner was requested to submit additional evidence that the proffered position meets one of four criteria stated at Title 8, Code of Federal Regulations, Part 214.2(h) (4) (iii) (A), for classification as a specialty occupation.

The petitioner returned this request with additional documentation in the form of letters from managers of other metropolitan orchestras including: The San Francisco Symphony, and Boston Symphony Orchestra. A letter from Ray F. Wellbaum of the Boston Symphony Orchestra characterizes orchestral musicians in the following statement:

> The overwhelming majority, (I would estimate over 95%), of the musicians of the Boston Symphony have earned bachelor's degrees as part of their training to attain the level of proficiency required to qualify for a position in our orchestra. . . . It is my opinion that the type of knowledge required to secure a position in a symphony orchestra today is usually associated with the attainment of a bachelor's or higher degree. Indeed, the only examples I am aware of where individuals have secured a position in an

> orchestra without first earning a bachelor's degree are those rare individuals whose talent develops so quickly that they win an orchestral audition for a position before completing their undergraduate work. Even in these cases, the individual will often complete their degree work after beginning their employment in the orchestra.

It is asserted by the petitioner that the employment of a few persons in the occupation who do not hold a baccalaureate degree or higher is irrelevant in a determination of the positions's qualification as a specialty occupation. The petitioner correctly affirms that statute, regulation, and precedent decisions allow for the beneficiary's qualification to perform services in a specialty occupation based upon equivalent work experience. However, this does not speak to the proffered position's eligibility.

Although the petitioner maintains that the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, it is concluded that the proffered position does not meet this standard. Referring again to the above-referenced letters of support, an alien who possesses exceptional talent may receive an audition, and ultimately, fill a position in an orchestra without possessing a degree, or specialized knowledge usually associated with the attainment of a baccalaureate degree or higher.

While many musicians in an orchestra hold baccalaureate or higher degrees, formal education to this level is not a requirement for employment.

As the petition has not established that the position offered meets one of the above criteria as enumerated in 8 CFR 214.2(h) (4) (iii) (A), supra, it cannot be concluded that the position qualifies as a specialty occupation.

In *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988), it was decided that the petitioner bears the burden of proof for the benefit sought in visa petition proceedings. The petitioner in this proceeding has clearly not met such burden.

In view of the above, the petition is hereby denied.

[SEAL]

U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

THE LOUISIANA PHILHARMONIC ORCHESTRA
821 GRAVIER STREET
NEW ORLEANS, LOUISIANA 70112

File: LIN9604551361

Office: Nebraska Service Center

Date: Aug. 28, 1998

IN RE: Petitioner: THE LOUISIANA PHILHARMONIC ORCHESTRA

Beneficiary: YING LIANG ZHAO

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: PETER KOERBER
601 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70130

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER, EXAMINATIONS

/s/ [Illegible]
Terrance M. O'Reilly, Director
Administrative Appeals
Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate

Commissioner, Examinations, on appeal. The appeal will be dismissed.

The petitioner seeks to employee the beneficiary as a violinist for a 21-month period. The director determined that the petitioner had not established that the offered position is a specialty occupation.

On appeal, counsel argues that the decision of the director misconstrues the law and is inconsistent with prior interpretations.

Counsel also requests oral argument. Oral argument, however, is limited to cases where cause is shown. It must be shown a case involves unique facts or issues of law which cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Counsel's request for oral argument is, consequently, denied.

Section 214(i) (1) of the Act, 8 U.S.C. 1184(i) (1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h) (4) (iii) (C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

> 1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> 2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or

> higher degree required by the specialty occupation from an accredited college or university;
>
> 3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> 4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary completed a four-year undergraduate program of violin in the stringed instrument department of Shanghai Conservatory of Music and graduated with a Bachelor's Degree in music in July, 1988. Additionally, she has performed as a member of the Shanghai Symphony Orchestra. It is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the offered position.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h) (4) (ii) as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor, including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a

> bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h) (4) (iii) (A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> 1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> 2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> 3. The employer normally requires a degree or its equivalent for the position; or
>
> 4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The duties of the offered position are described as playing violin in a full-time, full-sized professional symphony orchestra.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, *required* the services of individuals with baccalaureate or higher degrees for the offered position. In addition, the petitioner has not shown that similar orchestras require the services of such individuals in parallel positions.

facilities *require* the services of such individuals in parallel positions. [sic]

The Department of Labor's *Occupational Outlook Handbook*, 1996-1997 edition, at page 198 finds no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician. Some musicians hold baccalaureate degrees while others do not. Training is available at conservatories, through private study, and through practice with a musical group as well as at colleges or universities. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LOUISIANA PHILHARMONIC ORCHESTRA	*	CIVIL ACTION
	*	NO. 98-2855
VERSUS	*	SECTION "L" (1)
IMMIGRATION AND NATURALIZATION SERVICE	*	

ORDER AND REASONS

(Filed April 5, 1999)

Before the Court are two motions: 1) motion of plaintiff Louisiana Philharmonic Orchestra ("the Orchestra") for summary judgment; and 2) cross-motion of defendant Immigration and Naturalization Service ("INS") for summary judgment, seeking dismissal of plaintiff's appeal. For the following reasons, the Orchestra's motion is hereby GRANTED, the INS motion is DENIED, and the case is REMANDED to the Administrative Appeals Unit of the INS for further proceedings consistent with this opinion.

I. BACKGROUND

On November 27, 1995, the Orchestra filed a form I-129, Petition for Nonimmigrant Worker, on behalf of Lingyiang Zhao, seeking to classify her as an H-1B alien to perform services in a "specialty occupation." The Orchestra hoped to employ Zhao to play the violin.

An H-1B alien is one who comes temporarily to the United States to perform services in a specialty occupation. *See* 8 U.S.C. § 1101(a)(15)(H). A specialty occupation is one that requires a bachelor's degree or higher, or some equivalent thereof. Since a bachelor's degree was not an absolute prerequisite to employment within the "orchestra industry," INS requested that the Orchestra submit additional evidence to demonstrate that the violinist position met one of four regulatory criteria for qualifying as a specialty occupation. These criteria are:

> 1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> 2) The degree requirement is common to the industry in parallel positions among similar organizations, or in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> 3) The employer normally requires a degree or its equivalent for the position; OR
>
> 4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criteria is the center of this dispute. The Orchestra submitted evidence, including statements from orchestra directors around the country, that typically a very high percentage (often 90-95%) of their members possessed bachelor degrees or higher, although this was

not an absolute prerequisite to employment. *See* Pl.'s Mot. Summ. J., at 4-8. On May 6, 1996 INS's Nebraska Service Center denied the petition. INS concluded that, since the position was often filled through blind auditions, it did not meet the fourth criteria and was not a specialty occupation. INS determined that the Orchestra's evidence failed to establish that the duties involved with playing as a violinist were not so specialized that the knowledge required to perform them is usually associated with a bachelor's degree or higher.

The Orchestra appealed to the Administrative Appeals Unit ("AAU") of the INS on May 21, 1996. The AAU upheld the decision on August 28, 1998. The Orchestra then filed this suit on September 30, 1998, seeking judicial review of the agency determination under the applicable provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq.

The Orchestra filed its motion for summary judgment on February 3, 1999, asking the Court to reverse the AAU and require the INS to grant the petition. The Orchestra maintains that the decision is arbitrary and capricious and constitutes an abuse of discretion under the appropriate standard of review. It argues that INS has misapplied the test contained in the regulation by essentially requiring that all persons in the prospective specialty occupation have a bachelor's degree or higher. The proper inquiry, according to the Orchestra, is whether the skill required of the position is *usually*, rather than *always*, associated with a bachelor's degree or higher. *See* Pl.'s Mot. Summ. J., at 13.

The Orchestra further insists that INS abused its discretion in denying the petition because it had granted three previous H-1B petitions to individuals the Orchestra was attempting to hire. It has attached copies of three approval notices to its motion. Each notice grants an H-1B visa to nonimmigrants seeking to work for the Orchestra. *See* Pl.'s Mot. Summ. J. While the Orchestra concedes that INS is not bound by its own prior rulings, it asserts that the agency's failure to explain the inconsistent decision in this case was arbitrary and capricious, warranting reversal. *See* Pl.'s Mot. Summ. J., at 26-27.

The INS responded on February 23, 1999 with its own cross-motion for summary judgment. The agency argues that, under the appropriate standard of review, the Court must accord deference to its decision if it was based on substantial evidence, and may only reverse the AAU's ruling for abuse of discretion. *See* Def.'s Cross-Mot. Summ. J., at 6-7. In this case, INS insists that its ruling does not constitute an abuse of discretion because the Orchestra's evidence failed to prove that a degree or equivalent knowledge is a requirement within the "orchestra industry." The agency maintains that it need not abide by previous inconsistent decisions, and further suggests that Zhao may be entitled to a different type of visa, but not to an H-1B one. *See* Def.'s Cross-Mot. Summ. J., at 7-9. Nowhere does INS offer an explanation for departing in this case from its prior approval of the other three petitions.

II. ANALYSIS

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). In this analysis, the Court must view the facts and inferences from the evidence in the light most favorable to the nonmoving party. *See Crescent Towing & Salvage Co. v. M/V ANAX*, 40 F.3d 741, 743 (5th Cir. 1994). Once the moving party demonstrates that there is no issue of material fact, the burden shifts to the nonmoving party to prove that there is an issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The briefs reflect that there are no disputes of fact and that the issues for determination are purely questions of law. Summary judgment is therefore appropriate.

As an initial matter, INS enjoys broad discretion in deciding whether to grant or deny visa preference classifications. *See Omni Packaging, Inc. v. United States Immigration and Naturalization Servs.*, 733 F. Supp. 500, 502 (D.P.R. 1990). Such a determination is subject to judicial review in this Court. *See* 5 U.S.C. § 702. The Court shall reverse agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see National Hand Tool Corp. v. K.L. Pasquarell*, 889 F.2d 1472, 1475 (5th Cir. 1989). The standard is a highly deferential one which presumes an agency's action is valid. *See Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). This

narrow scope of review forbids a court from substituting its judgment for that of the agency, and mandates judicial affirmance if a rational basis exists for the agency decision, even if the court might otherwise disagree with it. *See id.*

If the denial of a petition is inconsistent with earlier decisions by the agency, this does not automatically constitute an abuse of discretion. *See Sussex Eng'g, Ltd. v. Montgomery,* 825 F.2d 1084, 1090 (6th Cir. 1987). An agency can abuse its discretion by failing to follow its own regulations, but the agency's *interpretation* of its regulations will be accorded substantial deference unless it is " 'plainly erroneous or inconsistent with the regulation.' " *Shanti, Inc. v. Reno,* No. Civ. 97-2777 MJD/AJB, 1999 WL 73982, at *12 (D.Minn. Feb.16, 1999); *see National Hand Tool Corp.,* 889 F.2d at 1475. While the Orchestra agrees that INS is not necessarily bound by prior decisions, it cites the *Omni Packaging* case for the proposition that an agency's failure to explain inconsistent rulings warrants reversal. *See* 733 F. Supp. at 504. In that case, the INS denied the plaintiff's visa petition to be classified as a member of the professions, despite the fact that it had previously granted the same individual a different type of visa, eligibility for which rested on the same criteria as those essential to determining the newer application. *See id.* While implicitly recognizing that INS need not abide by previous approvals that might have been erroneous, the district court found that the agency's failure to explain *why* those earlier decisions were incorrect amounted to an abuse of discretion. *See id.; see also Omni Packaging, Inc. v. United States Immigration and Naturalization Serv.,* 940 F. Supp. 42, 46 (D.P.R. 1996).

Although the Fifth Circuit found in *National Hand Tool* that the failure of the INS to explain why a prior inconsistent decision was not erroneous did not rise to an abuse of discretion, there is a critical distinction between that case and the present one. *See* 889 F.2d at 1476. In that case, the agency was applying a definition of the criteria at issue that had been revised since the time it had granted the earlier visas. *See id.* at 1474. That does not appear to be the situation here, since there has been no suggestion that the definition of a specialty occupation has changed at all between the time INS granted the Orchestra's earlier three visa requests and the time it denied the one currently in dispute. *National Hand Tool* is therefore inapposite.

In applying the standard of review to the Orchestra's case, the Court finds that INS abused its discretion. The Court disagrees with the Orchestra that INS misapplied its definition of a specialty occupation in such a way that a position qualifies only if it requires knowledge that is always or nearly always associated with a bachelor's degree or higher rather than knowledge that is usually associated with such a degree. This type of determination falls within the scope of discretion committed to the agency, and the Court cannot say that such a holding would be arbitrary and capricious. The agency's mistake, however, was in failing to offer any explanation whatsoever for the apparent inconsistency in its decisions regarding the Orchestra's applications for H-1B visas.

Neither the record nor the briefs reveal precisely what positions the three individuals to whom INS previously awarded H-1B visas were seeking to fill; the Court can only assume from each of the three notices' listing of

the Orchestra as petitioner that these individuals were also musicians. To then deny a visa for what is apparently a nearly identical position would fall within the discretion committed to the agency, but not without some sort of explanation articulating why the three previous approvals were erroneous. This is a situation quite similar to that in the *Omni Packaging* cases. The INS may be able to elucidate a rational basis for its denial of Zhao's petition and establish that the earlier approval notices were a mistake. INS must state these reasons, however, before it is entitled to the deferential standard of review it normally receives. The AAU abused its discretion by denying the petition without explaining its inconsistent decisions.

The Court will grant the Orchestra's motion and reverse the AAU's ruling. This matter will be remanded to the AAU with instructions to either: 1) grant the Orchestra's petition for Zhao; or 2) articulate a rational basis for its inconsistent treatment of the petition. The INS cross-motion will be denied.

III. CONCLUSION

For the foregoing reasons, IT IS ORDERED that the motion of plaintiff Louisiana Philharmonic Orchestra for summary judgment is hereby GRANTED, the cross-motion of defendant Immigration and Naturalization Service for summary judgment is DENIED, and the case is

REMANDED to the Administrative Appeals Unit of the INS for further proceedings consistent with this opinion.

Done this 5 day of April, 1999.
New Orleans, Louisiana.

/s/ Eldon E. Fallon
UNITED STATES
DISTRICT JUDGE

[SEAL] **U.S. Department of Justice**

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

THE LOUISIANA
PHILHARMONIC ORCHESTRA
821 GRAVIER STREET
NEW ORLEANS, LOUISIANA 70112

File: LIN9604551361

Office: Nebraska Service Center

Date: MAY -3 1999

IN RE: Petitioner:
THE LOUISIANA
PHILHARMONIC ORCHESTRA
Beneficiary:YING LIANG ZHAO

Petition: Petition for a Nonimmigrant Worker Pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:
PETER KOERBER
601 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70130

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE
COMMISSIONER, EXAMINATIONS

/s/ [Illegible]
for Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The United States District Court for the Eastern District of Louisiana reversed the August 28, 1998, decision of the Administrative Appeals Unit (AAU)

in this matter, and remanded the case to the AAU for a new decision consistent with the Court's opinion. *Louisiana Philharmonic Orchestra v. INS*, Civ. No. A 98-2855 (E.D.La. Filed April 5, 1999), 1999 WL 191484. The August 28, 1998, decision will be re-affirmed and the appeal dismissed.

In the August 28, 1998, decision, the AAU had upheld the decision of the Nebraska Service Center (NSC), denying H-1b status to a violinist because the position did not satisfy one of four regulatory criteria for a specialty occupation. The Court held that the AAU's decision on this point was the "type of determination [that] falls within the scope of discretion committed to the agency, and [that] the Court cannot say that such a holding would be arbitrary and capricious." 1999 WL 191484 at *4. The only basis for the remand, therefore, is the Court's finding that the "*AAU* abused its discretion by denying the petition without explaining *its* inconsistent decisions," *id. (emphasis added)*, in three other H-1b petition cases filed by this same petitioner for professional musicians. This new decision, therefore, incorporates and adopts the findings of fact and conclusions of law in the August 28, 1998, decision, and will address only the issue of the "prior inconsistent decisions."

The first, and most important, distinction between the August 28, 1998, AAU decision and the "prior inconsistent decisions" is that the "prior inconsistent decisions" were *not* AAU decisions. Immigration and Naturalization Service (Service) records reflect that the NSC approved an H-1b petition for a violinist filed by the Orchestra in 1993. Likewise, in the following year, the NSC approved speciality occupation status for a section violinist and

assistant principal viola. For the reasons discussed in the prior decision by the AAU in this matter, it is concluded that these petitions were approved in error. Like the intended beneficiary in this case, the beneficiaries in those three prior cases did not qualify for specialty occupation H-1b visas, for the reasons set forth in the August 28, 1998, AAU decision in this case. Had those three cases come before the AAU, whether because the NSC had certified the cases or because the petitioner had appealed decisions denying the petitions, it is reasonable to presume that the AAU would have held that the beneficiaries did not qualify for the H-1b visa.

It is important to note the relationship between the AAU and the NSC. The NSC has authority to decide H-1b petitions in the first instance. 8 C.F.R. § 214.2(h)(2)(I)(A). The AAU, by contrast, is the appellate body which considers cases under the appellate jurisdiction of the Associate Commissioner for Examinations. *Id.* § 103.3(a)(1)(iv). The AAU has jurisdiction over appeals from denials of H-1b visa petitions. 8 C.F.R. § 103.1(f) (3) (iii) (J). By designating an AAU decision as a precedent, the Commissioner can bind all Service center and district directors to follow the reasoning of the decision. *Id.* § 103.3(c). But the AAU is not bound by a decision of a Service center or district director. Indeed, the AAU could not exercise the error-correcting function that is central to its appellate jurisdiction, if, when an issue first came before the AAU, the AAU could be held to be bound to a Service center or district director's decision of which the AAU may not even be aware. To say this would be akin to saying that, when an issue comes before a United States Court of Appeals for the first time, the Court of Appeals

would be bound by a decision of a United States District Court, even though the Court of Appeals has jurisdiction to reverse the district court. On the basis of the record of proceeding in this case, it is clear that the prior AAU decision rested on a correct application of the law, that the dismissal of the petitioner's appeal was proper, and that the NSC decisions in the "prior inconsistent decisions" were in error.

As noted by the Court, 1999 WL 191484 at *3, the AAU is not bound by its own prior rulings, except for precedent decisions. In particular, the AAU, as an appellate body, is not bound by a decision of a Service officer deciding a visa petition in the first instance. The AAU issued the decision in the matter at hand consistent with its administrative decisions. The fact that the NSC, incorrectly, approved three similar petitions for the Orchestra more than five years earlier is only now made known to the AAU. This lack of knowledge is an additional, albeit practical rather than legal, explanation for the apparent inconsistencies by "the Service" regarding the Orchestra's petitions seeking H-1B classification. As discussed in the AAU decision issued on August 28, 1998, the Orchestra has not demonstrated that the violinist position satisfies one of the four regulatory criteria for qualifying as a specialty occupation under 8 C.F.R. § 214.2(h) (4) (iii) (A). As a result, the appeal will again be dismissed.

ORDER: The appeal is dismissed.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LOUISIANA PHILHARMONIC ORCHESTRA	*	CIVIL ACTION
	*	NO. 98-2855
VERSUS	*	SECTION "L" (1)
IMMIGRATION AND NATURALIZATION SERVICE	*	
	*	

ORDER AND REASONS

(Filed Mar. 15, 2000)

Before the Court is the motion to dismiss by defendant Immigration and Naturalization Service ("INS") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, the defendant's motion is GRANTED.

I. BACKGROUND

On November 27, 1995, the LPO filed a form I-129, Petition for Nonimmigrant Worker, on behalf of violinist Lingyiang Zhao, seeking to classify her as an H-1B alien. 8 U.S.C. § 1101(a)(15)(H). An H-1B alien is one who comes temporarily to the United States to perform services in a "specialty occupation." *See id.* A "specialty occupation" by definition requires a bachelor's degree or higher, or some equivalent thereof. *See id.* Because a bachelor's degree is not an absolute prerequisite to employment within the "orchestra industry," the INS requested that the LPO submit additional evidence to demonstrate that the violinist position met one of four

regulatory criteria for qualifying as a specialty occupation.[1]

The LPO submitted evidence, including statements from orchestra directors around the country, that typically a very high percentage (often 90-95%) of their members possessed bachelor degrees or higher, although this was not an absolute prerequisite to employment. *See* Pl.'s Mot. Summ. J., at 4-8. The INS Nebraska Service Center ("NSC") denied the LPO petition. The INS concluded that the position did not meet the fourth criterion of a specialty occupation because orchestra positions were often filled through blind auditions without regard to educational credentials. The INS concluded that the LPO's evidence failed to establish that the duties involved with playing as a violinist were so specialized that the knowledge required to perform them is usually associated with a bachelor's degree or higher.

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[1] These criteria include:

> 1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; 2) the degree requirement is common to the industry in parallel positions among similar organizations, or in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree; 3) the employer normally requires a degree or its equivalent for the position; or 4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

The Administrative Appeals Unit ("AAU") of the INS upheld the NSC decision upon appeal. The LPO then filed suit in this court seeking judicial review of the agency determination under the applicable provisions of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 701 et seq. The LPO argued on summary judgment that the decision was arbitrary and capricious and constituted an abuse of discretion under the appropriate standard of review. Specifically, the LPO insisted that the INS abused its discretion in denying the petition because it had granted three previous H-1B petitions to individuals that the LPO sought to hire.

On April 6, 1999, the Court granted the LPO's motion for summary judgment because the INS had abused it discretion by denying the LPO's petition without articulated reasons after having granted three H-1B petitions to similar LPO petitioners. *See Louisiana Philharmonic Orchestra v. Immigration and Naturalization Serv.*, 44 F. Supp.2d 800 (1999). The Court remanded the case to the AAU with instructions to either: (1) grant the LPO's petition for Zhao; or (2) articulate a rational basis for its inconsistent treatment of the petition.

On May 3, 1999, the AAU issued a ruling denying the petition and an explanation for the denial. The AAU stated that decisions by service centers were not binding precedent on the AAU and that substantial evidence supported the ruling. The LPO filed an amended complaint for judicial review contending that the AAU decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" because of the AAU's articulated reasons for the inconsistent treatment of H-1B petitioners. The LPO further maintains that substantial

evidence does not support the AAU's decision. In response, the INS moved to dismiss the LPO claim.

II. ANALYSIS

A. Standard of Review

A defendant may move to dismiss a plaintiff's complaint if it fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). If, on a motion asserting this defense, matters outside the pleadings are presented, the court shall treat the motion as one for summary judgment as provided by Rule 56 of the Federal Rules of Civil Procedure. *See id.*

The INS enjoys broad discretion in deciding whether to grant or deny visa preference classifications. *See Omni Packaging, Inc. v. United States Immigration and Naturalization Servs.*, 733 F. Supp. 500, 502 (D.P.R. 1990). Under the Administrative Procedure Act, an INS decision is reviewed solely to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A); *Defensor v. Meissner*, 2000 WL 29420,*1 (5th Cir. Jan 17, 2000). The standard is a highly deferential one that presumes an agency's action is valid. *See Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). Even if the court might otherwise disagree with an agency's decision, a court is forbidden from substituting its judgment for that of the agency if a rational basis exists for the agency's decision. *See id.*

B. Inconsistent Rulings

The LPO first argues that the INS abused its discretion because it issued inconsistent decisions concerning similar petitioners. While evidence of inconsistent treatment of petitions may be an abuse of discretion, it does not necessarily constitute an abuse of discretion. *See Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). The Fifth Circuit has held that an agency is not necessarily bound to follow its prior decisions; "[a]n agency must either confirm to its prior precedent or explain its reasoning for departure from that precedent." *Laclede Gas Co. v. Fed. Energy Regulatory Comm'n*, 722 F.2d 272, 275 (5th Cir. 1984).

In response to this Court's April 5, 1999 order, the INS has provided a rational basis for its departure from precedent in this case. The AAU explained that its decision concerning the LPO's application on behalf of Zhao was not controlled by earlier decisions concerning similar petitioners made by the service centers. The AAU stated that the approval notices in the other cases were not the "precedent" of the AAU. (May 3, 1999 decision). These other approval notices were entered by the NSC and involved requests for visas on behalf of two violinists and an assistant principal violinist. The AAU explained that these decisions were not precedent because they were decided by service centers and not by the AAU. While the service centers have authority to decide H-1B visa petitions initially, the AAU considers appeals of decisions regarding H-1B visa applications made by the service centers. *See* 8 C.F.R. § 214.2(h)(2)(I)(A); 8 C.F.R. §§ 103.1(f)(3)(iii)(J) and 103.3(a)(1)(iv).

The AAU's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the AAU. The INS Commissioner may require all service centers to follow the decisions of the AAU by designating certain AAU decisions as precedent. 8 C.F.R. § 103.3(c). Therefore, the AAU is not bound to follow the rulings of service centers that contradict the AAU decision in this case.

The INS further explains that the prior H-B1 [sic] petitions inconsistent with the AAU ruling in this case were mistakenly approved. The AAU states that the beneficiaries in these prior cases did not qualify for the speciality occupations visas for the same reasons that Zhao did not. Moreover, the AAU never reviewed these cases and if it had, the AAU could have also denied these visas. *See Shanti, Inc. v. Reno*, 36 F. Supp.2d 1151 (D.Minn, 1999) (holding that the INS did not abuse discretion in denying visa when INS found two similar prior visa petitions to have been approved in error). Thus, the INS has articulated a rational basis for its decision to explain the inconsistent treatment of the LPO petition.

C. Substantial Evidence

The LPO secondly contends that the INS abused its discretion by issuing a ruling not supported by substantial evidence. When questions of fact are presented, the court reviews the basis of an agency's decision to determine whether its findings are supported by substantial

evidence. *See Silwany-Rodriguez v. United States Immigration and Naturalization Servs.*, 975 F.2d 1157, 1160 (5th Cir. 1992). "The substantial evidence standard requires only that the [agency's] conclusion be based upon the evidence presented and be substantially reasonable." *Id.* Substantial evidence is a deferential standard, meaning a court cannot reverse the agency's decision simply because the court disagrees with the agency's apprehension of the facts. *Id.* To obtain a reversal of the agency's decision under this standard, it must be shown that the evidence presented was so compelling that no reasonable fact-finder could fail to arrive at a different conclusion. *See id.* at 1160.

The record suggests that substantial evidence supports the INS decision in the case. The AAU considered all of the evidence presented by the LPO, including the letters from various orchestra directors from around the country, in reaching its decision to deny the petition. While the evidence may support a conclusion different from the one by the AAU, it does not compel it. *See American Textile Mfr. Ins., Inc. v. Donovan*, 452 U.S. 490, 523 (1981) (noting that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). The INS was within its discretion in defining a speciality occupation in such a way that a position qualifies only if it requires knowledge that is always or nearly always associated with a bachelor's degree or higher rather than knowledge that is usually associated with such a degree. *See Louisiana Philharmonic Orchestra*, 44 F. Supp at 803.

The Court finds that the factual basis underlying the AAU's ruling is supported by substantial evidence and there is no compelling indication that the AAU's interpretation of the applicable statue [sic] is arbitrary or capricious. Therefore, the INS has not abused its discretion in denying the LPO's petition. Because the INS has articulated a rational basis for its inconsistent treatment of the petition and substantial evidence exists to support its decision, the LPO has failed to state a claim upon which relief can be granted.

III. CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss pursuant to Rule 12(b)(6) is hereby GRANTED.

Done this 13 day of March, 2000.
New Orleans, Louisiana.

/s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30424

THE LOUISIANA PHILHARMONIC ORCHESTRA

Plaintiff-Appellant

v.

IMMIGRATION AND NATURALIZATION SERVICE

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Filed Mar. 2, 2001)

(Opinion 1/24/01, 5 Cir., ___, ___ F.3d ___)

Before REYNALDO G. GARZA, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members

of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

Supreme Court, U.S.
FILED
AUG 1 2000
OFFICE OF THE CLERK

(2)

No. 00-1794

In the Supreme Court of the United States

LOUISIANA PHILHARMONIC ORCHESTRA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
JOHN C. CUNNINGHAM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12 pp

QUESTION PRESENTED

Whether the Immigration and Naturalization Service abused its discretion in denying petitioner's application for a preference visa based on a "specialty occupation."

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In the Supreme Court of the United States

No. 00-1794

LOUISIANA PHILHARMONIC ORCHESTRA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the decision is noted at 248 F.3d 1139 (Table). The order of the district court (Pet. App. 34-41) is not yet reported. The order of the Administrative Appeals Office of the Immigration and Naturalization Service (INS) (Pet. App. 29-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2001. A petition for rehearing was denied on March 2, 2001 (Pet. App. 42-43). The petition for a writ of certiorari was filed on May 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(i)(b) (1994 & Supp. V 1999), authorizes the INS to issue a specific number of preference visas each year to so-called "H-1B aliens," who are aliens who come temporarily to the United States "to perform services * * * in a specialty occupation described in section [214(i)(1)]." Section 214(i)(1) of the INA defines "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific speciality (or its equivalent) as a minimum for entry into the occupation in the United States.

8 U.S.C. 1184(i)(1).

The INS's regulations further provide that to qualify as a "specialty occupation," the position must meet one of the following criteria:

> (*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (*3*) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. 214.2(h)(4)(iii)(A).

The INS's determination whether to grant or deny a preference visa may be set aside on judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see Pet. App. 37.

2. In November 1995, petitioner applied to the INS on behalf of Lingyiang Zhao, a national and citizen of China, for a preference visa for Zhao temporarily to enter the United States, so that petitioner could employ her as a violinist. Petitioner sought to have Zhao classified as an H-1B alien who belonged to a speciality occupation. Pet. App. 20. In support of its application, petitioner submitted information on Zhao's personal qualifications and on the hiring practices of symphony orchestras. *Id.* at 9-12.

In May 1996, the Director of the INS Nebraska Service Center denied petitioner's application. Pet. App. 6-13. The Director found that "[w]hile many musicians in an orchestra hold baccalaureate or higher degrees, formal education to this level is not a requirement for employment," and that positions are often filled as a result of talent demonstrated at blind auditions. *Id.* at 12. Accordingly, the Service Center Director concluded that petitioner had not satisfied its burden of showing that Zhao belonged to a "specialty occupation" and, therefore, had not shown that Zhao was an H-1B alien. *Id.* at 13.

Petitioner appealed to the Administrative Appeals Office (AAO) of the INS.[1] In August 1998, the AAO dismissed petitioner's appeal. Pet. App. 14-19. The AAO affirmed the Service Center Director's finding that petitioner had failed to prove that the position of violinist is a "specialty occupation," explaining that petitioner had not shown that it required its violinists to hold baccalaureate or higher degrees, or that similar orchestras imposed such a requirement. *Id.* at 18. The AAO also noted that the Department of Labor's *Occupational Outlook Handbook* found that there is "no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician," and that the required skills may be obtained through training at conservatories, private study, or practice with other musicians. *Id.* at 19.

Petitioner sought review of the AAO's order in the District Court for the Eastern District of Louisiana. In April 1999, the district court issued a decision setting aside the AAO's decision and remanding. Pet. App. 20-28. The district court rejected petitioner's contention that the AAO had "misapplied its definition of a specialty occupation in such a way that a position qualifies only if it requires knowledge that is always or nearly always associated with a bachelor's degree or higher [degree] rather than knowledge that is usually associated with such a degree," and emphasized that that "type of determination falls within the scope of discretion committed to the agency." *Id.* at 26.

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[1] In the meantime, Zhao entered the United States under a preference visa granted by the INS pursuant to 8 U.S.C. 1101(a)(15)(O)(i), based on her "sustained national or international acclaim," and began to work for petitioner. Zhao, however, subsequently gave birth to a child and left petitioner's employment. See Pet. 9.

The district court nonetheless found that the AAO had failed to explain adequately why it denied petitioner's application after the Service Center Director had granted three previous H-1B alien applications filed by petitioner on behalf of other violinists. Pet. App. 23, 26-27; see also *id.* at 31-32. In light of this "apparent inconsistency," the court remanded to the INS with instructions to grant Zhao's petition or "articulate a rational basis for its inconsistent treatment of the petition." *Id.* at 26-27.

3. In May 1999, the AAO issued a decision addressing the reason for the different result in this case compared with the prior decisions relied upon by petitioner. Pet. App. 29-33. The AAO explained that the three previous approvals were unpublished Service Center Director orders, and "*not* [AAO] decisions," and that they did not bind the AAO because the AAO has supervisory appellate authority over Service Center Director adjudications. *Id.* at 31- 33. The AAO further stated that the prior Service Center Director approvals were erroneous because the beneficiaries, like Zhao, "did not qualify for speciality occupation H-1b visas." *Id.* at 32. The AAO affirmed the other findings and conclusions in its initial decision and dismissed the appeal. *Id.* at 33.

Petitioner sought review of the AAO's decision in the district court. In March 2000, the district court granted judgment for the INS and dismissed petitioner's complaint. Pet. App. 34-41. The court observed that "[t]he INS enjoys broad discretion in deciding whether to grant or deny visa preference classifications." *Id.* at 37 (citing 5 U.S.C. 706(2)(A)). The court then held that the AAO's decision should be sustained, explaining that on remand "the INS has articulated a rational basis for its decision to explain the [apparently] inconsistent treat-

ment of [petitioner's] petition." *Id.* at 39. The prior decisions relied upon by petitioner, the court noted, "were not precedent because they were decided by service centers and not by the [AAO]." *Id.* at 38. Moreover, the AAO had concluded that the prior petitions "were mistakenly approved." *Id.* at 39. After examining the record, the district court further found that "substantial evidence supports the INS decision in this case" that petitioner has not met its burden of proving Zhao belonged to a "speciality occupation." *Id.* at 40.

The court of appeals affirmed in a per curiam decision that adopted the reasoning of the district court's opinion. Pet. App. 1-5. A petition for rehearing was denied. *Id.* at 42-43.

ARGUMENT

The court of appeals' unpublished decision upholding the INS's denial of petitioner's application for a preference visa is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 12) that the INS abused its discretion in denying its application, focusing on the agency's application of the fourth criterion of the regulatory definition of "speciality occupation." That criterion provides that the "knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree." 8 C.F.R. 214.2(h)(4)(iii)(A)(4). The INS reasonably found that petitioner failed to meet that standard. Based on the Department of Labor handbook discussed above and a statement by petitioner's own personnel manager that "[m]usicians are hired by symphony orchestras by blind audition, not on the basis of their education or academic

performance," Pet. App. 10, the AAO reasonably concluded that Zhao did not belong to a specialty occupation. See *id.* at 40. Accordingly, both the district court and the court of appeals properly found that the INS did not abuse its discretion in denying the request for a preference visa.[2]

2. Petitioner contends that the INS unlawfully changed the regulatory standard in 8 C.F.R. 214.2(h)(4)(iii)(A)(4) from "usually associated" to "always or nearly always associated." Pet. 12. That contention is without merit. The AAO did not purport to change the regulatory definition of "specialty occupation" in this case, but instead merely found that "petitioner has failed to establish that any of the four factors enumerated [in the regulation] are present in this proceeding." Pet. App. 18. The administrative record, moreover, established that there was "no requirement of a baccalaureate or higher degree *in a specialized area* for employment as a musician." *Id.* at 19. That fact in itself precluded a finding that the knowledge required to perform the duties of a musician was "usually associated with the attainment of a baccalaureate or higher degree" under the regulation. 8 C.F.R. 214.2(h)(4)(iii)(A)(4).

In any event, to the extent that the AAO's unpublished and nonbinding (see 8 C.F.R. 103.3(c)) order in this adjudication could be construed as requiring that an occupation must "always or nearly always" require a higher educational degree, it still would not be arbitrary or capricious. Indeed, the INA expressly pro-

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[2] Even if a contrary conclusion would have been supported by the record, that would not in itself be sufficient to warrant reversal by a court. See *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

vides that a "specialty occupation" requires "attainment of a bachelor's or higher degree in the specific speciality (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. 1184(i)(1)(B).

3. Petitioner contends (Pet. 17-20) that the AAO failed adequately to explain its decision to deny the petition, and that the court of appeals should have vacated and remanded for a more detailed explanation. That factbound argument provides no basis for granting certiorari and, in any event, is contradicted by the record. As the district court found, the AAO "considered all of the evidence presented by [petitioner], including the letters from various orchestra directors from around the country, in reaching its decision to deny the petition." Pet. App. 40. The record supports that finding. See *id.* at 10-12, 18-19. Moreover, the AAO's decisions establish that the INS carefully considered petitioner's application, and concluded that petitioner failed to meet its burden in establishing that Zhao belonged to a specialty occupation. See *id.* at 6-13, 16-19, 31-33.

4. Finally, we note that this case would provide a poor vehicle to consider petitioner's factbound claims that the INS improperly denied its application for a preference visa. As petitioner acknowledges (Pet. 9), the INS granted Zhao a preference visa based on her national or international acclaim, which enabled Zhao to enter the country and work for petitioner. See 8 U.S.C. 1101(a)(15)(O)(i). Zhao, however, subsequently left petitioner's employment. Pet. 9. That fact greatly undercuts if not eliminates any continuing basis for

review of the INS's denial of the preference visa application at issue in this case.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
JOHN C. CUNNINGHAM
Attorneys

AUGUST 2001

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[3] Petitioner claims (Pet. 9-10) that "[t]he issuance of [the other] visa does not moot this action, because this action presents a recurring issue, which would otherwise evade review." There is no basis for concluding that the issue would evade review in a future case. But even if petitioner's assertion on that point were true for purposes of establishing jurisdiction, the facts that the INS granted a visa to Zhao, and that Zhao no longer is employed by petitioner, makes this case a poor vehicle to consider the questions presented.